UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ST. LOUIS CARDINALS, LLC Plaintiff, vs. DOUGLAS J. LEWIS d/b/a STL PRODUCTS Defendant.	)	No. 4:07-CV-473 (CEJ)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiff St. Louis Cardinals, LLC ("Plaintiff") submits this memorandum of law in opposition to Defendant Douglas J. Lewis's Motion To Dismiss. Whether construed as a motion to dismiss, a motion for judgment on the pleadings or a motion for summary judgment, Defendant's one page submission is procedurally improper and substantively devoid of any merit. Unsupported by any meaningful legal argument, legal authorities or substantive memorandum, and without reference to a single item of evidence or any specific infirmity in Plaintiff's pleading, Lewis's motion has no good faith basis and should be summarily denied.

INTRODUCTION

Plaintiff, owner of the ST. LOUIS CARDINALS Major League Baseball club, commenced this action for trademark infringement and unfair competition on March 9, 2007 with the filing of a complaint. The complaint alleges that defendant Lewis has willfully infringed Plaintiff's famous CARDINALS marks – comprising or containing the words ST. LOUIS CARDINALS, CARDINALS, CARDINAL or CARDS and/or the depiction of a cardinal bird (collectively "Plaintiff's CARDINALS Marks") – by selling merchandise bearing trademarks and logos identical or confusingly similar to Plaintiff's CARDINALS Marks. See Complaint ¶ ¶ 11-17. Because defendant's conduct is so unabashedly unlawful, the claims asserted against him are simple and straightforward.

On March 27, 2007, Lewis filed his "response" to the complaint in the form of an answer to the allegations of the complaint, followed by a short essay on how plaintiff is "discriminating" against his small business by not letting him use Plaintiff's marks, excerpts from discovery responses he served in an administrative proceeding in the United States Patent and Trademark Office ("USPTO"), and references to third party trademark registrations and applications totally removed from this dispute. Lewis's answer pleads no affirmative defenses.

On March 29, 2007, Lewis filed a curiously styled "Reply Memorandum" – no motion was pending at the time – in which he indicated that he had voluntarily cancelled a number of the his state trademark registrations which were the subject of a count for cancellation in Plaintiff's complaint. Among the marks covered by those state registrations were such brazen infringements as "Go Cards St. Louis Baseball."

On April 24, 2007, Lewis forwarded to Plaintiff's lead counsel in New York City an email commenting on a proposed scheduling plan, followed by the Motion to Dismiss that is the subject of this memorandum. The email version of the Motion to Dismiss bears an unsigned certificate of service claiming that the "Reply Memorandum" was served by mail on April 23, 2007. Also on April 24, 2007, Plaintiff's counsel received notice that the Motion to Dismiss had been filed electronically via the Court's ECF system. This version of the motion bears a signed certificate of service stating that the "Reply Memorandum" was served via mail on April 19, 2007, thus contradicting the email version and again mislabeling the document. In fact, on April 25, 2007, plaintiff's local counsel in St. Louis received by mail a copy of the motion in an envelope postmarked April 24, 2007, and on April 30, 2007, plaintiff's primary counsel in New York received by mail a copy of the motion in an envelope also postmarked April 24, 2007. Thus, the certificate of service that accompanied the electronic filing of the motion appears to be not only confusing, but false.[1]

Putting aside these irregularities with respect to the timing of service, Lewis's Motion to Dismiss is fraught with procedural errors and lacks any substantive merit or argument. Filed after an answer that pleads no affirmative defenses, the motion is certainly untimely as a motion to dismiss and, in any event, without any basis if construed as a motion for judgment on the pleadings or for summary judgment. These procedural and substantive infirmities are discussed below.

ARGUMENT

1. Defendant's Motion is Procedurally Improper

In order to determine whether Defendant's motion is procedurally proper, the Court must first determine what the nature of the motion is. While Defendant styles the document as a "Motion to Dismiss," the timing of its filing and the two paragraphs that comprise its total "argument" suggest otherwise. This motion was filed on April 24, 2007, nearly a month after Lewis had filed his March 27, 2007 answer, which in turn failed to plead any affirmative defenses. The sole stated basis for the motion is that "there is no genuine issue for trial."

Pursuant to Fed. R. Civ. P. 12(b), a motion to dismiss for failure to state a claim must be asserted either in a responsive pleading or in a motion submitted before that pleading. See 5B C. Wright & A. Miller, Federal Practice and Procedure §1357, at 408 (3d. ed. 2004) ("A motion made under Rule 12(b)(6) that raises the defense of failure to state a claim upon which relief may be granted must be made before the service of a responsive pleading…"). Where such motions are filed post-answer, they are "untimely" and must instead be construed as a motion for judgment on the pleadings or for summary judgment. Id.

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[1]In the United States Patent and Trademark Office administrative proceeding that preceded the instant lawsuit, Lewis similarly filed bogus certificates of service, and Plaintiff routinely had to retrieve documents from the USPTO website notwithstanding Lewis's certifications that he had mailed them to opposing counsel.

Preliminarily, whether deemed a motion for judgment on the pleadings or for summary judgment, Lewis's motion runs afoul of Local Rule 7-4.01(A), which requires the moving party to file with each motion a supporting memorandum containing argument and citations to controlling authorities. Lewis's conclusory, unsupported two paragraph submission hardly complies. There is no clearly identified separate motion or memorandum of law, but instead a two-paragraph document that insists that there are no genuine issues of fact to be tried and complains, irrelevantly and falsely, that Plaintiff failed to contact Lewis prior to commencing suit.[2]

If construed as a motion for summary judgment, the motion additionally fails to comply with Local Rule 7-4.01(E), which requires that the memorandum of law attach a statement of uncontroverted material facts, set forth in separately numbered paragraphs and supported by record citations. Needless to say, Lewis has not even attempted to meet this requirement and attaches no supporting evidence of any fact at all. Failure to comply with this requirement standing alone justifies dismissal.[3]

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[2] While the parties' prior communications are irrelevant to dispositions of this motion, Lewis's claim that there had been no prior correspondence between the parties is wrong. This lawsuit was preceded by more than a year of failed and frustrating negotiations, and in fact, Plaintiff even forwarded Lewis a draft settlement agreement covering all marks in dispute in late 2005.

[3] Because Lewis has not filed the required statement of undisputed material facts, there is no statement to which to respond and Plaintiff has thus not filed the ordinarily required responsive statement. Plaintiff reserves the right to respond to any such future statement that might be filed, and to the extent Lewis' motion can be deemed to allege any "facts," Plaintiff does not admit the truth of such facts.

Finally, Lewis's motion is unsigned and thus fails to comply with Fed. R. Civ. P. 11(a), which requires that a party or its attorney sign any motion and state the signer's address and telephone number. In fact, the only signature appearing on Lewis's motion relates to his apparently false certificate of service and not to the motion itself. Pursuant to Fed. R. Civ. P 11(a), such "unsigned papers shall be stricken unless omission of the signature is corrected promptly."

2. Defendant's Motion Is Also Substantively Baseless

More fundamentally, Lewis's motion is devoid of any factual or legal support and does not even attempt to make the basic showing necessary to support dismissal at this early stage. The motion makes basically two statements. First, in a backwards description of the parties' respective burdens on this motion, Lewis asserts the naked conclusion that "Plaintiff has not set forth specific facts showing that there is a genuine issue for trial, and instead is relying on his pleadings alone." Second, Lewis asserts – falsely, as described in footnote 2, infra – that Plaintiff filed suit without a prior "roundtable" with Lewis in a fashion that violates his rights to "Due Process." The first assertion is a legal error, and the second a total non-sequitur.

If deemed a motion for judgment on the pleadings pursuant to Fed. R. Civ. P 12(c), Lewis's motion faces a "strict" standard: "judgment on the pleading is not appropriate unless the moving party has clearly established that no material issue of fact remains to be resolved and he is entitled to judgment as a matter of law … This Court must accept as true all facts pled by the non-moving party, and grant all reasonable inferences from the pleadings in the non-moving party's favor." National Car Rental System, Inc. v. Computer Associates Int'l, Inc., 991 F.2d 426, 428 (8th Cir. 1993). Such a motion "only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C C. Wright & A. Miller, supra, § 1367, at 208 (citing numerous cases).

A Rule 12(c) motion is of course addressed only to the pleadings themselves, so Lewis's complaint that Plaintiff "is relying on his [sic] pleadings alone" is no argument at all. Indeed, this case is only at the pleadings stage and discovery has not commenced. Moreover, as set forth in the authorities above, it is the moving party's burden to prove the absence of any disputed material facts, but Lewis does nothing of the sort. Indeed, he makes no reference whatever to the specific allegations of the complaint and simply states in conclusory fashion that Plaintiff has failed to set forth facts supporting its claims. Mr. Lewis has apparently not reviewed the complaint.

For instance, Plaintiff's complaint alleges that Lewis is using essentially identical or highly similar replicas of Plaintiff's valuable trademarks on a wide variety of merchandise purporting to promote Plaintiff's famous baseball club. Among other acts of infringement, Lewis has sold clothing and other items bearing the designations "I ♥ ST. LOUIS CARDINALS," "GO CARDS ST. LOUIS BASEBALL" and various copies of Plaintiff's well-known bird design, all in a fashion that suggests that he or his merchandise is authorized or licensed by Plaintiff. The complaint further alleges that he has obtained state trademark registrations (which are granted without any substantive review) for such facially unlawful marks as "I LOVE ST. LOUIS CARDINALS" and "EAST ST. LOUIS CARDINALS." See Complaint ¶ ¶ 13-16.[4]

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[4] Lewis's response to the allegations concerning his improper state registrations is yet another example of how little he appreciates his responsibilities in filing pleadings. In response to paragraph 16 of the complaint, which spells out his procurement of those registrations, Lewis curiously denies "knowledge or information sufficient to form a belief" as to whether he obtained those registrations. See Answer at 5 (responding to Paragraph 16 of the Complaint). And yet, in his mislabeled "Reply Memorandum" filed March 29, 2007, he advises the Court that he has voluntarily cancelled those very same registrations.

In other words, it would be hard to imagine a more clear-cut case of willful trademark infringement. If deemed true, as is required on this motion, these facts more than amply support Plaintiff's claims for relief under the Lanham Act and corresponding state law. They portray – accurately, as will be proved at trial – that Lewis is a trademark pirate, flouting Plaintiff's rights and doing violence to basic legal principles of unfair competition. Lewis, however, ignores these allegations and simply intones his mantra that there is nothing alleged here that merits a trial.

To the extent his motion is deemed one for summary judgment, it is equally defective. In enumerating the basic principles of summary judgment as "to which all courts would agree," Professors Wright and Miller explain, "it is well settled that the party moving for summary judgment has the burden of demonstrating that the Rule 56(c) test – 'no genuine issue as to any material fact' – is satisfied and that the movant is entitled to judgment as a matter of law. The movant is held to a stringent standard." 10A C. Wright & A. Miller, supra, § 2727 at 455-56. Moreover, "a moving party always bears the burden of informing the Court of the basis of its motion." Walker v. Lowe's Home Centers, Inc., 2006 U.S. Dist. LEXIS 77206, at *5 (E.D. Mo. Oct. 12, 2006).

Lewis has simply made no effort to meet his burden. As a threshold matter, he has failed even to inform the Court of the basis on which his motion is made, simply stating without explanation that there is no issue for trial. As noted above, he has also failed to comply with the Local Rules' requirement that a statement of undisputed facts set forth in separately numbered paragraphs be filed with the motion. Finally, and most significantly, he has not come forward with any evidence or support of any kind to discharge the high burden he bears in seeking summary judgment. He has submitted no affidavit, no discovery materials (because discovery has not commenced) nor any argument in support of his one-sentence conclusion that there is "no genuine issue for trial." See Fed. R. Civ. P. 56(c) (summary judgment may be granted only if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"). Indeed, besides reciting the standard without any suggestion that it has been met, the only other "point" Lewis makes is that Plaintiff failed to negotiate with him before bringing suit. That "point" is both false, as can be proved by copious documentation, but more important, entirely irrelevant, as the failure to negotiate before filing suit would of course have no impact on the validity of the underlying claim.

Although Lewis claims that Plaintiff may not rely on its pleadings alone, he ignores the fact that he bears the initial burden of proving the absence of any genuine issues of material fact through a properly supported summary judgment motion. See, e.g., Alford v. Anderson, 2007 U.S. Dist. LEXIS 28675, at *4 (E.D. Mo. April 18, 2007). See also Fed. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in the rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading …") (emphasis added). Lewis has utterly failed to satisfy his burden, which obviously requires something more than simply saying there are no factual issues. Because Lewis has come forward with literally nothing to support his motion – no argument, no explanation, no record evidence of any kind – his motion must be denied.

It is well established that a plaintiff's pro se status does not excuse him from complying with the Federal Rules of Civil Procedure. Pittman v. Boxes of St. Louis, Inc., 2006 U.S. Dist. LEXIS 55775, at *3-4 (E.D. Mo. Aug. 10, 2006). Plaintiff has filed a motion that is not only procedurally deficient, but utterly devoid of any substantive merit. The Court should deny the motion and admonish Plaintiff that he must comply with the relevant rules if he intends to continue representing himself in this proceeding.

CONCLUSION

For the foregoing reasons, Lewis's motion to dismiss should be denied.

Dated: April 30, 2007

ARMSTRONG TEASDALE LLP

BY: /s/ Nicholas B. Clifford, Jr. ______________

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of April 2007, a true and accurate copy of the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon the following persons:

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and via United States Postal Service, as First Class Mail, this 30th day of April, 2007, postage pre-paid to:

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/s/ Nicholas B. Clifford, Jr.